

March 9, 1998

Mr. Thomas E. Rutten
Assistant City Attorney
City of Devils Lake
PO Box 1048
Devils Lake, ND 58301-1048

Dear Mr. Rutten:

Thank you for your letter inquiring whether a violation of a Devils Lake city ordinance prohibiting consumption of alcohol by minors requires proof that the consumption occurred within the city limits of Devils Lake.

Whether to prosecute a person for violating a city ordinance is generally left to the city attorney's discretion. Also, this office usually will not issue opinions on the interpretation of city ordinances because the question is one of local law. 1994 N.D. Op. Att'y Gen. 64. However, because your question involves the interpretation of an ordinance that is very similar to a state statute, I am responding to our question with this opinion. The city attorney continues to be ultimately responsible for interpreting the ordinance and may interpret the ordinance differently than we interpret the state statute.

This office has obtained a copy of the Devils Lake ordinance prohibiting the consumption of alcohol by minors, which is very similar to the language of N.D.C.C. § 5-01-08. N.D.C.C. § 5-01-08 provides in part:

Except as permitted in this section and section 5-02-06, any person under twenty-one years of age . . . consuming alcoholic beverages other than during a religious service, being under the influence of alcoholic beverages . . . is guilty of a class B misdemeanor.

(Emphasis added). The above-underlined language, also commonly known as the "consumption law," was adopted by the 1991 Legislative Assembly as House Bill 1319.

To directly respond to your question, it is necessary to determine what specific conduct is prohibited by the ordinance and N.D.C.C. § 5-01-08. The statute and the ordinance both prohibit the "consuming" of alcoholic beverages by a minor. The word "consuming" connotes active conduct, i.e., the eating, drinking, or ingesting of alcoholic beverages.

Some may believe that an offense has been committed under N.D.C.C. § 5-01-08 if a minor has ingested an alcoholic beverage but is not otherwise possessing or consuming a beverage when approached by law enforcement officers. Although there is no specific decision of the North Dakota Supreme Court on this issue, it is very likely that such a belief or interpretation of N.D.C.C. § 5-01-08 is erroneous. The "consumption law" in N.D.C.C. § 5-01-08, by its specific language, is applicable only to proof of "consuming" alcoholic beverages and not

solely to proof that a minor has, at some time before discovery by a law enforcement officer, consumed an alcoholic beverage.¹

It is a well settled rule of statutory construction that penal statutes are to be construed strictly against the government or parties seeking to impose them and in favor of persons on whom they are sought to be imposed. State v. Sheldon, 312 N.W.2d 367 (N.D. 1981). Unless a minor is charged with possession of an alcoholic beverage by virtue of the fact that the beverage is within that person's bodily systems or is under the influence of alcoholic beverages, discovery by an officer that a person under the age of 21 years has been drinking an alcoholic beverage may not be sufficient, by itself, to establish a violation of the "consumption law."

In many instances N.D.C.C. § 5-01-08 has been relied on when an officer has noticed the odor of alcohol on a person under 21 years of age even if the person does not have a container in his or her possession and does not appear under the influence of alcohol. Arresting a person for a violation of the "consumption law" in N.D.C.C. § 5-01-08 or a similar city ordinance based on the odor of alcohol would be problematic since the arrest would be based on the officer's observations that the person had consumed an alcoholic beverage rather than that the person was consuming such a beverage.

This distinction is important because a law enforcement officer can make a warrantless arrest for a misdemeanor offense only if the offense was committed or attempted in the officer's presence. N.D.C.C. § 29-06-15(1)(a). Absent proof that the person under the age of twenty-one years was "consuming" an alcoholic beverage in the officer's presence, the warrantless arrest may not be authorized.

The importance of this distinction is also demonstrated by your question. If the conduct prohibited in N.D.C.C. § 5-01-08 or the city ordinance is limited to the "consuming" of alcoholic beverages, proof of the act of "consuming" would be a necessary part of the presentation of your case in the Devils Lake Municipal Court.² City ordinances are limited in their effect to places within one-half mile of the city limits. N.D.C.C. § 40-06-01(2). The jurisdiction of municipal courts is similarly limited. N.D.C.C. § 40-18-01; 1986 N.D. Op. Att'y Gen. 119. As a result, since the "consuming" of alcoholic beverages would be an essential element of the offense under the city's "consumption law," proof of the commission of that element of the offense within the territorial scope of the Devils Lake municipal ordinances would be required. The location of a violation of a "consumption law" as a jurisdictional matter cannot be assumed, but must be established by evidence submitted to the court. See State v. Abu-Shanab, 448

¹ As originally introduced, House Bill 1319 imposed criminal liability upon a person under the age of 21 years for "consuming or having recently consumed alcoholic beverages other than during a religious service." However, this bill, as amended and enacted, prohibited only the consuming of alcoholic beverages and not prohibiting the conduct of "having recently consumed" such beverages.

² These issues may not arise, however, if the offender is in possession of, or under the influence of, an alcoholic beverage. These violations of N.D.C.C. § 5-01-08 would most likely occur in the presence of the officer permitting a warrantless arrest and establishing the jurisdictional element of the offense.

N.W.2d 557 (Minn. Ct. App. 1989); State v. Sorenson, 758 P.2d 466 (Utah Ct. App. 1988).

Merely because a person under the age of 21 years may have an alcoholic beverage within that person's system or on his or her breath within the limits of the City of Devils Lake would not be sufficient, by itself, to establish the "consuming" element of the offense. This is not to say, however, that such an offense could never be proven. If it can be established that, at some time prior to that person's contact with the law enforcement officer, the person consumed alcoholic beverages within the City of Devils Lake, the case could be proven. This proof could be shown by statements of the offender, testimony of witnesses who had observed the offender consuming alcoholic beverages within the city, or other proof sufficient to establish this element of the offense. The odor of alcoholic beverages may be evidence of the consuming of alcoholic beverages but would not, by itself, establish where the "consuming" took place.

In conclusion, it is my opinion that, to prosecute a person for violating a Devils Lake city ordinance prohibiting consumption of alcohol by minors, the city must show that the consumption occurred within the territorial limits of the city of Devils Lake.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rpb/vkk